

Summer 2011

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Recommended Citation

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AMENDING THE PRISON LITIGATION REFORM ACT: IMPOSING FINANCIAL BURDENS ON PRISONERS OVER TAX PAYERS

MALLORY YONTZ*

I. INTRODUCTION

Fierce flames stretched their unrelenting claws around the homes of twelve unsuspecting families on the west side of Indianapolis in 2001.¹ The conflagration consumed twelve apartments, causing \$2 million in damage and leaving twelve families homeless. This life-altering firestorm would have been a regrettable accident—but it was no accident. Rather, it was the intentional act of Eric Smith.² Smith was quickly arrested after the incident and was later charged with arson, convicted, and sentenced to twenty years in prison.

During his time in prison, Smith came to the startling realization that his hair was thinning.³ With the very real danger of baldness looming in the arsonist's future, he made requests to prison officials for Rogaine.⁴ When his requests were denied, he

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1. Bob Segall, *Prisoner Lawsuits Costly to State*, 13 INVESTIGATES, <http://www.wthr.com/story/5097630/prisoner-lawsuits-costly-to-state?clienttype=printable> (last visited Oct. 10, 2011). This article discusses the costly effect of prison litigation on the state of Indiana's economics. *Id.* The article sets the foundation for its argument by illustrating the facts behind the act of arson that put Eric Smith behind bars, and then pointing out the ridiculous nature of his lawsuit (premised on denial of Rogaine being a denial of constitutional rights) by citing his actual complaint. *Id.* Also, a letter that was written from Smith to prison officials illustrates the disingenuous attitude and motive behind his lawsuit. Finally, the article stirs up aggravation in the average citizen by pointing out the injustice in the fact that it is the taxpayer who foots the bill for *pro se* prison plaintiffs who are in their present positions because they have already committed transgressions against society. *Id.*

2. *Id.* The article states that the perpetrator, Eric Smith, was "quickly" arrested after the incident. There is no mention of consideration of other suspects that may have been responsible for igniting the fire. *Id.*

3. *Id.* It is explained that Eric Smith made requests for Rogaine "to help his thinning hairline." *Id.*

4. ROGAINE, <http://www.rogaïne.com> (last visited Oct. 10, 2011). Rogaine is a FDA approved treatment that is clinically proven to re-grow hair through repetitious topical application.

decided to file a lawsuit.⁵ Smith claimed that the denial of Rogaine equated to “cruel and unusual punishment,” that “baldness is causing [him] mental harm, pain, and self-image problems,” and that he has an “inalienable right to obtain hair-loss products.”⁶ Apologies to Mr. Smith, but a search to find access to Rogaine among the constitutional rights comes up short. While his baldness may be troubling to him, query whether the twelve families whose homes were reduced to ash, courtesy of Mr. Smith, have a slightly more compelling plight. Regardless of the blaringly inane and downright preposterous nature of Smith’s lawsuit, he was still afforded access to the court system and the State bore the financial burden of defending his lawsuit.⁷

Eric Smith is only one of thousands of inmate plaintiffs⁸ who file lawsuits against the State. Although access to the courts is a cornerstone of American ideology, many prisoners⁹ are abusing this right, and they are doing so at the expense of the taxpayers.¹⁰ The expense of prison litigation is daunting on its face, but in light

5. Segall, *supra* note 1. Westerville superintendent Bill Wilson argued, “Rogaine is not one of Mr. Smith’s basic needs, [and] as long as [I am] providing him with his basic needs, I don’t see why we need to provide Mr. Smith with Rogaine.” *Id.* The article also explains that the Mr. Smith feels his right to Rogaine is protected under Article 1 of the Bill of Rights of the Indiana State Constitution. *Id.* Additionally, Wilson stated that inmates “have a lot of time on their hands but time is money to us and to the state.” *Id.*

6. *Id.* at 10, 17–18.

7. See JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 87 (1991) (explaining that access to the court system is a fundamental right that has been repeatedly affirmed by the United States Supreme Court as paramount to the concept of due process of law contained in the Fourteenth Amendment of the Constitution). Specifically, Palmer argues that the right of an inmate to exercise this basic constitutional right was established in the 1940 case of *Ex parte Hull*. *Id.*

8. See Segall, *supra* note 1 (explaining that the Attorney General’s Office defends against thousands of prisoner lawsuits).

9. See JOHN BOSTON, THE PRISON LITIGATION REFORM ACT 1-2 (Sept. 14, 2004), available at www.wnyc.net/pb/docs/plra2cir04.pdf (explaining that the term “prisoner” refers to “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” (citing 42 U.S.C. § 1997e(h) (2006); 28 U.S.C. § 1915(h) (2006); 28 U.S.C. § 1915A(c))). Under the PLRA, military prisoners are also categorized as prisoners. *Marrie v. Nickels*, 70 F. Supp. 2d 1252, 1262 (D. Kan. 1999). Those held in private jails are prisoners under the PLRA as well. *Herrera v. Cnty. of Santa Fe*, 213 F. Supp. 2d 1288, 1293 (D. N.M. 2002). Those held in juvenile facilities are also prisoners. *Lewis v. Gagne*, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003). Also categorized as prisoners are those held in drug rehabilitation centers. *Witzke v. Femal*, 376 F.3d 744, 752-53 (7th Cir. 2004).

10. See Segall, *supra* note 1 (quoting deputy attorney general Patricia Erdmann saying “[p]risoners have a right to use the courts but they don’t have a right to abuse the courts and certainly not at taxpayers[] expense.”).

of the damaged economy that is struggling to stay above water,¹¹ the cost is simply unwarranted and disproportionate to the weight of prisoners' claims.¹² Although attempts have been made to rectify this issue, the American judicial system has been mired in countless frivolous claims brought by inmates for decades, and perhaps the economic state of the country¹³ is just the setting required to inspire substantial resolution.

Part II of this Comment will supply the background of prison litigation, detailing how prisoners bring these claims, the volume in which they bring them, and what has previously been done in an attempt to curb abusive prison litigation. Part III will present an economically centered argument addressing the high cost of litigation juxtaposed with the high frivolity of the suits. Part IV will propose that the economic burden each prisoner places on the State to fund the life of their lawsuit should be balanced with a financial penalty against a prisoner for filing a frivolous lawsuit. This Comment investigates frivolous prison litigation, its effect on the state's economy, and explores viable solutions.

II. BACKGROUND

Prisoners were not always afforded the access to the courts that they currently enjoy.¹⁴ Today, however, prisoners effortlessly

11. See *Recession*, N.Y. TIMES, http://topics.nytimes.com/top/reference/time_stops/subjects/r/recession_and_depression/index.html?scp=4&sq=US%20economic%20recession%202008&st=Search (last updated Sept. 20, 2010) (explaining that although there is no widely recognized specific definition of "recession," the National Bureau of Economic Research defines recession as "a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales."). The Bureau has come to be accepted as the authority on definitive dates of recessions and expansions. *Id.* The National Bureau of Economic Research announced on December 1, 2008, that the United States economy entered a recession as of December 1, 2007. *Id.*

12. See CITIZENS AGAINST LAWSUIT ABUSE, CITIZENS IN CHAINS: THE HIGH COST OF PRISONER LAWSUITS TO CALIFORNIA TAXPAYERS (Aug. 2008), available at <http://www.sdcala.com/programs/calareports/culturereport?tmpl=component&print=1&page=> (explaining that in the midst of the budget crisis the prison system is one of California's highest expenses). The burden that the state undertakes as a result of lawsuits filed by prisoners is economically taxing, worsens the clogging of the court system, and demands special attention. *Id.* Also, many of the claims filed by inmates are "minor grievances at best" and are often lacking in merit altogether. *Id.*

13. *Recession*, *supra* note 11.

14. *Betha v. Crouse*, 417 F.2d 504, 505-06 (10th Cir. 1969). The court referenced its previous treatment of prisoner's claims, stating that:

We have consistently adhered to the so-called 'hands off' policy in matters of prison administration according to which we have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those

arrive in federal court through Section 1983 of the United States Code.¹⁵ Section 1983 was actually passed during the post-Civil War era in 1871 as the first section of the "Ku Klux Klan Act."¹⁶ In essence, Section 1983¹⁷ allows a person to bring suit against a person violating their constitutional rights while acting under the color of state law.¹⁸

This statute existed for nearly one hundred years before it was utilized as a means to bring suit against state officials in 1961.¹⁹ The practice of utilizing Section 1983 to recover from state officials stems directly from the Supreme Court's decision in *Monroe v. Pape*.²⁰ Three years later, the Supreme Court first acknowledged that the right to bring suit against state officials extends to prisoners. In *Cooper v. Pate*, the Court ruled that inmates have standing to bring suits in federal court under

confined, lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials.

Id.; See also Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1229 (1998) (stating that convicted prisoners were once considered slaves of the state who had no rights, so prison litigation was nonexistent (citing *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871))). In *Ruffin*, a Virginia court refused to even hear plaintiff's claim simply based on the fact that he was a prisoner. *Ruffin*, 62 Va. (21 Gratt.) at 796. It was not until after the civil rights movement when the Warren Court eventually conceded that prisoners should at least have some rights that the Constitution provides. Herman cited *supra* at 1229.

15. 42 U.S.C. § 1983 (2006).

16. MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1-3 (2d ed. 2008).

17. SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 4 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 1998).

18. 42 U.S.C. § 1983. This section provides that:

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

19. SCHWARTZ, *supra* note 16, at 1-2.

20. *Monroe v. Pape*, 365 U.S. 167, 173 (1961). It articulates that the purpose of Section 1983 was (1) to "override certain kinds of state laws"; (2) to provide "a remedy where state law was inadequate"; and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173-74. This case was later reversed on other grounds.

Section 1983 as a matter of recourse for their grievances.²¹

Common claims brought by prisoners usually fall under the category of prison conditions²² and encompass a wide range of complaints consequently providing the foundation and building blocks for an onslaught of claims. However, only in the past forty years have Section 1983 claims transformed from a shield to a sword. In 1966,²³ merely 218 state prisoners petitioned the federal courts under Section 1983.²⁴ The number of claims grew exponentially over time,²⁵ and by 1994 the number of filed suits swelled to an astonishing 56,000.²⁶ The problem of superfluous suits was only compounded by liberal judges who took *great* pains to investigate the merit and resolution of these claims.²⁷ The number of prisoners' suits overwhelming the federal court system and the way in which judges were handling them became the catalyst for Congress to make changes and enact "corrective" legislation.²⁸ This legislation became known as the Prison Litigation Reform Act (hereinafter "PLRA" or "the Act").²⁹

The much-needed PLRA was enacted by Congress in 1996.³⁰

21. See generally *Cooper v. Pate*, 378 U.S. 546 (1964) (reversing the Court of Appeals for the Seventh Circuit which had affirmed a dismissal by the United States District Court for the Northern District of Illinois of a state prisoner's suit against the prison warden under Section 1983).

22. See Boston, *supra* note 9, at 90 (defining prison conditions as "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.").

22. 42 U.S.C. § 1997e(a).

23. James E. Robertson, *A Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. ILL. U. L.J. 1, 3 (2001). The article states that 1966 was the first year that a "tally" of the number of suits brought by prisoners under Section 1983 was recorded. *Id.*

24. HERBERT IRA HANDMAN ASSISTED BY WILLIAM J. FULLER III, *THE RIGHTS OF CONVICTS* 55 (1975).

25. Robertson, *supra* note 23, at 3. Robertson points out that since the commencement of the tracking of prison litigation statistics, the number of prisoners' claims has grown exponentially over the years. *Id.*

26. *Id.*

27. Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290 (2004). The article explains that Congress was concerned about the way in which federal judges chose to deal with prison litigation. *Id.* The judges "intervened in the operation of state prison systems; ordered extensive, detailed, and costly reforms; and monitored compliance with court orders for often more than a decade." *Id.* at 290-91.

28. See *id.* (explaining that the PLRA responded to two primary concerns of Congress: (1) high numbers of suits filed by prisoners that "were perceived as clogging up the courts and costing taxpayers large amounts of money with frequently frivolous litigation"; and (2) the actions of federal judges involved in such suits).

29. *Id.*

30. *Id.* at 290.

Critics³¹ note that the Act itself was not privy to the rigorous debate or discussion that it deserved.³² Rather, it was passed as a rider to the Balanced Budget Downpayment Act, and did not have a Judiciary Committee Report or a committee mark-up.³³ In spite of this, or perhaps because of this, the bill still had its opponents, who voiced concerns regarding its constitutionality.³⁴ In fact, even after it was enacted, opponents maintained that provisions of the PLRA would be struck down as invalid by the courts.³⁵ Surprisingly, perhaps, courts did not strike down the provisions,³⁶ and in fact courts have repeatedly upheld the PLRA against constitutional attacks.³⁷

The Act itself has two main objectives: to curtail prisoner litigation and reduce federal court intervention in state prisons.³⁸ In order to meet these goals, the PLRA includes several provisions aimed to deter frivolous suits.³⁹ One such provision, and one of the most frequently litigated,⁴⁰ is the requirement that prisoners fully exhaust the grievance process⁴¹ that exists within their respective

31. *Id.* The article indicates that although the Act was passed there were still members of Congress who opposed it.

32. See Herman, *supra* note 14, at 1277 (explaining that “[t]he legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate.”).

33. 142 CONG. REC. S2285-02 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy).

34. Thomas Julian Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585 (1999).

35. Deborah Decker, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micromanagement?*, 1997 WIS. L. REV. 1275 (1997).

36. See Belbot, *supra* note 27, at 291 (claiming that based on judicial behavior since the Act was passed, “it is . . . clear that courts will not take the PLRA to task.”).

37. Katherine Bennett & Rolando V. Del Carmen, *A Review and Analysis of Prison Litigation Reform Court Decisions: Solution or Aggravation?* 77 PRISON JOURNAL 405 (1997); Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts, and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483 (2001); See also Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999 (2001) (stating that the United States Supreme Court has upheld PLRA provisions in four court cases and has not struck down any of the PLRA provisions). Also, this practice has extended to the district and circuit courts where only very few courts have ruled against the Act. *Id.*

38. Belbot, *supra* note 27, at 291. The PLRA is divided into two sections.

39. See *id.* (stating that the PLRA's provisions “impose financial and other restrictions on prisoner plaintiffs thereby making it more difficult for them to file lawsuits under § 1983.”).

40. Boston, *supra* note 9, at 10.

41. Interview with Paul W. Groah, Assistant State's Attorney, Cook County, Illinois, in Chi., Ill. (Sept. 3, 2010). The grievance process may vary slightly between different correctional facilities, but it ordinarily consists of

prisons before they can file a claim in federal court.⁴² With respect to this particular provision, the United States Supreme Court has noted: “Beyond doubt, Congress enacted [PLRA section] § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”⁴³

While this may have been a valiant attempt to resolve judicial inefficiency, some courts, though not entirely striking down the provision, have found ways around it.⁴⁴ Not only do courts find ways to justify a prisoner’s failure to exhaust remedies,⁴⁵ but they have also found it to be an affirmative defense subject to waiver.⁴⁶ The Second Circuit has also suggested that there may be another exception in light of possible irreparable harm to the prisoner,⁴⁷ and other courts have applied this view.⁴⁸ Perhaps most confusing for courts is the fact that the statute is frustratingly silent on how to proceed when the prisoner has not exhausted the grievance process.⁴⁹ The discretion that the courts have instilled in

the prisoner filling out a grievance form detailing her complaint, submitting it, waiting for a response, and then possibly appealing the response or filing a new grievance. *Id.*

42. The grievance process provision provides in pertinent part:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

43. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

44. *See Boston*, *supra* note 9, at 11 (explaining that the Second Circuit has held that the PLRA exhaustion requirement is not jurisdictional and accordingly courts may “apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.” (citing *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1208 (10th Cir. 2003); *Richardson v. Goord*, 347 F.3d 431, 433–34 (2d Cir. 2003))). Further, the Second Circuit has held that “special circumstances” may also justify a failure to exhaust administrative remedies. *Boston*, *supra* note 9, at 11.

45. *Richardson*, 347 F.3d at 433. Where the appellate record was unclear as to whether administrative remedies had actually been exhausted as the PLRA requires, the court concluded that “failure to exhaust administrative remedies is not a jurisdictional predicate . . .” *Id.*

46. *See Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (3d Cir. 2002) (stating that exhaustion of administrative processes is an affirmative defense that is subject to waiver if it is not adequately preserved by the defense); *Randolph v. Rodgers*, 253 F.3d 342, 348 n.11 (8th Cir. 2001).

47. *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001).

48. *See Howard v. Ashcroft*, 248 F. Supp. 2d 518, 533-34 (M.D. La. 2003) (holding that the prisoner does not have to exhaust administrative remedies for an appeal when the complaint at issue involves transfer from a corrections facility to a prison and prison officials wanted to continue with the transfer regardless of a pending appeal).

49. *See Boston*, *supra* note 9, at 17-18 (explaining that most circuits have consistently held that the statute requires that the exhaustion process occur

themselves⁵⁰ with regard to answering this silence tends to negate the provision altogether.

An additional PLRA provision that significantly affects frivolous suits is the three strikes provision.⁵¹ This provision seeks to limit overzealous inmates who repeatedly bring frivolous suits⁵² by limiting their access to courts after bringing three such suits. In theory, the application of this provision appears straightforward; in practice, however, its application borders arbitrary.⁵³ For instance, a prisoner may maneuver around this provision if he earnestly believes that he has not filed a frivolous suit.⁵⁴

The PLRA's mental or emotional injury provision⁵⁵ has also caused much confusion for courts.⁵⁶ This provision was intended to ensure that a prisoner claiming a mental or emotional injury could not recover compensatory damages unless he could also show that he sustained some form of physical injury that was the result of the conduct complained of.⁵⁷ The actual language⁵⁸ of the statute

prior to the suit being brought and that failure to do so should result in dismissal, but again courts have discretion on this matter).

50. *Id.*

51. 28 U.S.C. § 1915(g). The statute provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Id.

52. *Id.*

53. Boston, *supra* note 9, at 116-17. The article details the complications that arise when courts decide if a strike should be applied, especially when a case is dismissed but then the prisoner appeals. *Id.*; See Adepogba v. Hammons, No. 95-31249, 1996 U.S. App. LEXIS 41289, at *14 (5th Cir. 1996) (suggesting that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals."). Also, there are variations in rulings with respect to partial dismissals. See Barela v. Variz, 36 F. Supp. 2d 1254, 1259 (S.D. Cal. 1999) (holding that partial dismissal was not to be considered a strike).

54. Boston, *supra* note 9, at 122. The article introduces the "breathing space" principle, which stands for the concept that prisoners will only receive a strike against them if they knowingly or intentionally file suits that take advantage of the judicial system. *Id.*

55. 42 U.S.C. § 1997e(e) states, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." *Id.*

56. Boston, *supra* note 9, at 98. The article asserts that the mental and emotional injury provision of the PLRA is poorly written and is fraught with confusion. *Id.*

57. Belbot, *supra* note 27, at 296. The article explains the meaning behind the provision. *Id.* The article then goes on to suggest that this provision could potentially ban inmates from recovering monetarily for suits claiming

has been the source of some of the bewilderment, as the very essence of the provision elicits perplexity; courts have questioned the exact definition of “mental and emotional injury.”⁵⁹ Confusion regarding the meaning of this provision and its relation to damages leaves its objective unfulfilled.⁶⁰

New financial restrictions were also a part of the PLRA. Prior to the passage of the PLRA, federal courts had the authority to permit prisoners to file lawsuits *in forma pauperis*⁶¹ as long as they also filed an affidavit stating that they were unable to pay costs.⁶² The allowance of proceeding *in forma pauperis* was a

violations such as “denial of mental health care, racial discrimination, denial of religious freedoms, psychological torture, and retaliation for filing grievances . . .” *Id.*

58. See Boston, *supra* note 9, at 98 (explaining that the use of the word “prior” has brought so much confusion in fact that courts altogether ignore it). Also, an issue of those who bring suit after they are released and thus are no longer “prisoners” has added problems. *Id.*

59. See *id.* at 101 (recognizing that while some courts have failed to answer what “mental and emotional injury” really refers to, others have answered the question quite simply by stating that “the term ‘mental or emotional injury’ has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts.” (citing *Amaker v. Haponik*, No. 98 CIV. 2663(JGK), 1999 WL 76798, at *7 (S.D.N.Y. Feb. 17, 1999))).

60. See *id.* at 100 (observing that although courts have held, with respect to damages, that “compensatory damages for actual injury, nominal, and punitive damages remain available,” this is “nonsense” because the precise language of the *in forma pauperis* mental and emotional injury provision of the PLRA specifically spells out that “[n]o . . . action may be brought” rather than “no compensatory damages may be recovered”).

61. 28 U.S.C. § 1915; FED. R. APP. P. 24. *Black’s Law Dictionary* defines “*in forma pauperis*” as “[Latin ‘in the manner of a pauper’] [i]n the manner of an indigent who is permitted to disregard filing fees and courts costs when suing, a poor person is generally entitled to proceed *in forma pauperis*.” BLACK’S LAW DICTIONARY 849 (9th ed. 2009). For instance, in many jurisdictions, an indigent divorce petitioner’s filing fee and court costs are waived.

62. 28 U.S.C. § 1915(a). That section provides:

(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

device that was highly attractive, easily attainable, and consequently, widely employed by prisoners.⁶³ When the PLRA was enacted, it considerably altered the previous law by making *in forma pauperis* filing more challenging.⁶⁴ In essence, the new provision of the PLRA required a more substantial showing of inability to financially support a lawsuit.⁶⁵ The modifications to filing *in forma pauperis* were, in theory, meant to encourage a prisoner to consider a cost-benefit analysis prior to deciding to bring action against the State.⁶⁶ Additionally, the revised financial restrictions were intended to combat the realization that prisoners often file suits, in part, to cope with the monotony of prison life and to pester prison officials.⁶⁷

The PLRA, though arguably well intentioned, was not a carefully considered piece of legislation.⁶⁸ While the Act attempts to reduce cost and volume of prison litigation, its techniques have yet to adequately reduce frivolous litigation or save the federal courts money,⁶⁹ both of which are crucial given the nature of the current judicial and economic climates. We must also be cognizant of the fact that the nature of claims has seen a tremendous

(3) An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

Id.

63. See Belbot, *supra* note 27, at 298 (stating that the "vast majority" of suits filed by inmates are filed *in forma pauperis*); See generally Kim Mueller, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255 (1995) (describing the process a prisoner goes through in filing a 1983 claim including how to achieve *in forma pauperis* status).

64. See generally Belbot, *supra* note 27, at 298 (explaining in detail that in order to proceed *in forma pauperis*, the prisoner must submit in their affidavit a list of all the assets they possess and also file a certified copy of their trust fund account statement covering the six months prior to the filing of the suit). There is also a new formula, which provides that the costs of filing will be assessed based on an average of the inmate's trust fund balance and also explains how the court will come to collect this money. *Id.*

65. See *id.* (explaining the process that a prisoner must follow to proceed *in forma pauperis*).

66. See *id.* (explaining the rationale behind the economic details of the new provision).

67. Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998).

68. See Herman, *supra* note 14, at 1277 (suggesting that the "legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate.").

69. *Id.* The article states that, "[i]n substance, the Act takes a scattershot approach" to minimizing prison litigation with respect to cost and volume. *Id.* The strategies of the PLRA do not necessarily reduce frivolous litigation, nor do they necessarily save the federal courts money. *Id.*

transformation—the subject of cases circa the 1960s and 1970s⁷⁰ drastically differs from that of more modern cases.⁷¹ Once legitimate claims have morphed into outlandish exaggerations, only embellishing the severity of excessive prison litigation and further demanding a solution.

III. ARGUMENT

The provisions⁷² of the PLRA have left the judicial system with a gnawing and inescapable sense of emptiness where satisfying resolution was so craved; a steady stream of frivolous prison litigation persists. In 2008, twelve years after the passage of the PLRA, the State of California conducted an in-depth study (hereinafter “the California Report” or “the Report”) focusing on the overwhelming burden of costly prison litigation against the background of a state mired in economic turmoil.⁷³ Although the Report concedes that not every single lawsuit filed by a prisoner is

70. See generally *United States ex rel. Smith v. McMann*, 417 F.2d 648 (2d Cir. 1969) (discussing cases where inmates had established procedural rights that they were denied). After a conviction for manslaughter in the first degree and a sentence of ten to twenty years, Smith wished to file suit claiming denial of equal protection of the laws because he was not provided with his right to appeal due to the fact that he was an indigent defendant who did not know and was not informed of his right to prosecute an appeal financed by the state. *Id.*; See also *Church v. Hegstrom*, 416 F.2d 449, 450 (2d Cir. 1969) (addressing situations where inmates are denied medical care for urgent conditions). Prisoner Harold Church was incarcerated for three weeks before he died in the Connecticut State Jail of pulmonary emphysema and intensive bronchopneumonia. *Id.* The administrator of his estate brought an action against four prison officials under Section 1983 for failure to provide medical care even after officers observed that the prisoner did not look well. *Id.*; *Wiltsie v. Cal. Dep’t of Corrections*, 406 F.2d 515, 516 (9th Cir. 1968) (regarding a suit brought by a prisoner who was beaten on his head and back with billy clubs by prison officials during a routine strip search).

71. See *CITIZENS*, *supra* note 12, at 4 (describing the suit filed by a death row prisoner, convicted of sixteen murders, against an author who published a study about his case (citing Denny Walsh, *Inmate Wins Federal Case; Jury Directs Folsom Staffers to Pay \$39,000 in Punitive Damages*, SACRAMENTO BEE, Nov. 11, 2007)). The prisoner claimed that the publication “smeared his good name” and “hurt his prospects for future employment” and sought \$62 million in damages. *Id.*

72. The provisions mentioned *supra* notes 52, 56, and 63 dealing with the three strikes rule, mental and emotional injury rule, and new financial rules respectively.

73. See generally *CITIZENS*, *supra* note 12 (discussing the effect of costly and protracted prison litigation on the state of California’s overextended budget illustrated by extensive statistical analysis). The article emphasizes the argument that frivolous prison litigation intensifies already clogged court systems and prevents judicial efficiency. *Id.* The article also makes the point that the burden of prison litigation is ultimately shouldered by the taxpayers. *Id.*

without merit,⁷⁴ it gives substantially more weight to the fact that “[m]any lawsuits filed by prisoners are minor grievances at best, which—if they have any merit at all—deserve only modest payments far less than the state’s cost to process the cases.”⁷⁵

Perhaps one of the more poignant articulations that the California Report boasts is its assertion that the process of filing frivolous suits is merely a “hobby” for prisoners.⁷⁶ It may seem odd that one would consume his time by filing endless lawsuits that are the antithesis of legitimate claims, yet this odd hobby is a seemingly pedestrian prisoner practice—normal, commonplace, and even expected in prison life. It would behoove (and likely amuse) the reader to consider whether the motivation behind the following suits is truly founded in righting a wrong and the American ideal of justice.

Meet James Higgason. He is serving time at the Westville Correctional Facility.⁷⁷ While serving time for the crime of burglary, Higgason assaulted a corrections officer.⁷⁸ For his crimes, Higgason is housed in a special unit of the Westville facility, dubbed the Maximum Control Unit, which houses some of Westville’s most dangerous and violent inmates.⁷⁹ Inmate Higgason’s claims against the State revolve around his lack of access to pornographic magazines.⁸⁰ Higgason’s Section 1983 lawsuit alleges that prison officials caused him “pain, suffering, humiliation, mental anguish, emotional distress and financial loss”⁸¹ in their denial of the requested men’s magazines. Another of Higgason’s lawsuits alleged that his civil rights were violated when he was not permitted to be naked in his cell.⁸²

It is important to note the resources expended by the State to

74. See *id.* at 3 (explaining that while some lawsuits are justified, many others are simply adding to the already clogged judicial system, thereby standing as a roadblock to justice for others awaiting their day in court).

75. *Id.*

76. See *id.* (asserting that “frivolous lawsuits amount to a very expensive taxpayer funded hobby for prisoners while they await parole.”).

77. See generally Bob Segall, *State Fights Back Against Frivolous Prisoner Lawsuits*, 13 INVESTIGATES, <http://www.wthr.com/Global/story.asp?s=5119003&clienttype=printable> (last visited Oct. 10, 2011) (relating the story of prisoner James Higgason, discussing the subjects of his repeated lawsuits, and explaining the cost that prisoner lawsuits impose on the state in spite of the three strikes rule). The article also explains the measures inmates take to navigate around the three strikes rule (which is incorporated in the PLRA). *Id.*

78. *Id.*

79. *Id.* The article states that the Maximum Control Unit of the Westville Correctional Facility is home to prisoners who are deemed to be the most “violent and difficult” in the state. *Id.*

80. See *id.* (stating that Higgason sued the State claiming that he had a right to pornographic magazines).

81. *Id.*

82. *Id.* Higgason filed another lawsuit while incarcerated claiming the right to be naked in his cell. *Id.*

deal with Higgason's suits. Higgason's right to pornography suit was eventually dismissed by a magistrate, then appealed, then defeated again, and then subsequently re-filed, repeatedly.⁸³ This resulted in the Attorney General's office exhausting time, energy, and finances in protracted court proceedings.⁸⁴ Lawsuits filed by Higgason are consuming office space over at the Attorney General's office, where they have several boxes encumbered with the task of storing his lawsuits—114 suits in total filed in eight years.⁸⁵ One such suit brought by Higgason named 153 defendants.⁸⁶ Per the Federal Rules of Civil Procedure,⁸⁷ 153 copies of the complaint had to be made, 153 copies had to be sent to the defendants via certified mail, and 153 defendants required legal representation (which would be supplied by the Attorney General's Office).⁸⁸ Magistrate Judge Ann Smith Mischler⁸⁹ has explained that Higgason's lawsuits, *despite being dismissed*, cost the state thousands and thousands of dollars.⁹⁰

Meet John Robert Demos, Jr. Demos was convicted of burglary and attempted rape.⁹¹ A sentence of up to ten years in prison was imposed for the attempted rape, and a sentence of "up to life" for the burglary.⁹² This left Demos with more than ample

83. *Id.* Higgason's pornography claim was dismissed, then he appealed, and then he lost on appeal. *Id.* He then continued to repeatedly file suit citing the same cause of action. *Id.*

84. *Id.* The Deputy Attorney General, Patricia Erdmann, stated that, "[e]ven though we successfully defended [the pornography suit], he appealed. He lost on appeal. He continued to file the same lawsuit over and over and over again." *Id.*

85. *Id.*

86. *Id.* Higgason brought one suit against every member of the state legislature, which is comprised of 153 members. *Id.*

87. The Federal Rules of Civil Procedure govern notice and process of service. Federal Rule of Civil Procedure 4 requires that a copy of the complaint be served upon the defendant. Specifically, Rule 4 states: "A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service." *Id.* Note that this means, as in the case in the text, that if there are a number of defendants they must all be served with a copy of the complaint. *Id.*

88. *Id.* Sullivan County Magistrate Ann Smith Mischler described the procedure involved in the execution of a lawsuit with 153 named defendants as time consuming and redundant. *Id.*

89. *Id.* Ann Smith Mischler is the magistrate responsible for dismissing both Higgason's right to pornography magazines lawsuit and right to be naked lawsuit. *Id.*

90. *Id.* Ms. Mischler explained that mailing, copying, and filing adds up to thousands of dollars for each lawsuit. *Id.*

91. Elizabeth Rhodes, *Lone Warrior For Justice? — Jailhouse Lawyer's Filings Brought Special Ruling By Supreme Court*, SEATTLE TIMES, May 20, 1991, <http://community.seattletimes.nwsourc.com/archive/?date=19910520&slug=1284240>.

92. *See id.* (explaining that a jury found Demos guilty and a judge

time on his litigious little hands to begin his own personal siege on judicial efficiency. The several suits filed by inmate Demos allege violations of his civil rights under Section 1983. Specifically, Demos alleges that: (1) “his civil rights have been violated because paper money is no longer backed by silver”;⁹³ (2) “as a member of the Choctaw Indian tribe, he is entitled to a \$15 million reimbursement for treaties broken in the 1800s”;⁹⁴ (3) “as a male, he is a victim of sex discrimination because the prison system [would not] ship him to the Washington Corrections Center for Women”;⁹⁵ and (4) “his rights were abridged when the prison did not recognize his new name, Anwarr Ibenn Abdul Hakeem Shabazz.”⁹⁶ Not only did Demos fashion a flagrant display of his newly found zeal for all avenues legal by petitioning the court to grant him motions for relief, motions for extraordinary relief, special affidavits, and personal restraint petitions,⁹⁷ but he also decided to display his legal prowess by appealing to the Supreme Court of the United States—thirty-two times.⁹⁸ Meet Scott Anthony Gomez, Jr. Gomez was convicted of a weapons-related charge in 2004. After serving out his sentence he was released, then arrested again for violating his parole, and was sent to Pueblo County Jail in Colorado. While serving his time, Gomez attempted to add escape artist to his rap sheet. In his attempt to repel down the side of the facility using a chain of tied-together bed sheets, he fell some forty feet and seriously injured himself. Subsequently, Gomez filed a suit against the sheriff claiming that the prison had made escape too easy and seeking damages for his injuries.⁹⁹ The cases of Higgason, Demos, and Gomez are illustrative of the nature of many of the frivolous suits filed each

pronounced the sentences for each of the crimes).

93. *Id.* The article provides a list of the specific allegations that inmate Demos brought against the prison. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* (explaining that Demos was on his way to becoming one of the most litigious prisoners in history when he began filing countless motions in what the article calls “a blizzard of paperwork.”).

98. *Id.* After noting that Demos appealed “one too many times,” the article clarifies by stating that he actually appealed directly to the United States Supreme Court thirty-two times. *Id.*

99. DeeDee Correll, *Prisoner's Lawsuit Says It Was Too Easy to Escape*, L.A. TIMES, Jan. 13, 2008, <http://www.latimes.com/news/print/edition/asection/la-na-jailscape13jan13,0,1707749.story>. Gomez attempted to escape from his cell on two separate occasions. *Id.* His first attempt included pushing up a ceiling tile, making his way through the ventilation system, and eventually repelling down the side of the building using a rope made from bed sheets. *Id.* Two days later, Gomez was discovered and returned to his cell. *Id.* His second attempt mirrored his initial strategy but was foiled when his bed sheet rope failed. *Id.*

year by bored and restless prisoners. It is exactly this kind of prison litigation that the California Report investigated.¹⁰⁰

These frivolous suits could be dismissed as fodder for amusing anecdotes if they were not also, as the California Report points out, a major contributing source of economic hardship on the state.¹⁰¹ The Report actually goes so far as to assert that prison litigation is one of the “central issues at play” with regard to the state’s budgetary woes.¹⁰² The costs associated with prison litigation can be broken down into three categories: (1) costs associated with staff within the prisons; (2) costs of obtaining legal counsel to defend the litigation; and (3) costs associated with any settlements or judgments.¹⁰³ Every business day, prisoners file an average of two lawsuits.¹⁰⁴ In order to deal with the staggering number of lawsuits filed, the California prison system staffs an average of 126 positions.¹⁰⁵ In the 2005-2006 budgetary year alone, the State of California dished out \$15.9 million in settlements and judgments.¹⁰⁶ Between 2000 and 2008, the state paid prisoners over \$89 million in settlements.¹⁰⁷ The Report¹⁰⁸ asserts that the average cost of prison litigation is \$32 million annually.¹⁰⁹

The economic impact alone is justification for legislation that limits such litigation. Enter the PLRA. Unfortunately, the provisions set forth in the Act are not truly effectuating their

100. See generally, CITIZENS, *supra* note 12 (discussing the high costs of prison litigation, much of which is frivolous).

101. Recall that most prisoners are filing *in forma pauperis* and thus they do not pay for costs related to their suit, but rather the state foots the bill.

102. *Id.* at 3.

103. *Id.* at 5. The article breaks down the three major costs that contribute to the vast expense of prison litigation. *Id.* With respect to staff within the prisons, California prisons have actually created an entirely new unit to deal specifically with cases filed by the prisoners. *Id.*

104. *Id.* at 6. The article relied on statistics from an investigation into the California Public Records, which noted settlement and judgment amounts in prisoner-related civil suits on a year-to-year basis, case materials filed by inmates, and documents relating to the costs incurred by various departments related to hiring of legal counsel. *Id.*

105. *Id.* at 10. This figure was arrived at by averaging the number of staffers employed over the six budgetary years beginning with 2002-2003 and ending with 2007-2008. The budgetary year 2008-2009 was not included in the calculation.

106. *Id.* at 6.

107. *Id.* The article notes that these settlements are from cases that never proceeded to the trial phase.

108. It should be cautioned that these statistics are not exemplary of the nation as a whole, and only represent one state—California. It must be assumed that if statistics from the fifty states were aggregated, the numbers would be far higher. California is to be viewed as a model—representative of the issues that face all states in the country.

109. *Id.* at 8. The litigation at issue in the study is all litigation initiated by prisoners.

purpose.¹¹⁰ Consider the three strikes provision.¹¹¹ This provision, on its face, seems as if it would be particularly effective—especially considering the fact that many prisoners are repeat offenders when it comes to filing countless frivolous claims.¹¹² Surely limiting prisoners to three frivolous suits would cut down on excessive suits. Unfortunately, the intended impact of this provision has never materialized because prisoners have found paths to bypass the provision altogether.¹¹³ Inmates who “strike out”¹¹⁴ in one jurisdiction simply try their luck in another, where the judges may be unaware of their previous strikes.¹¹⁵

Furthermore, the Supreme Court has opined that entirely denying access to the courts, even for prisoners, is improper,¹¹⁶ as restricting judicial access would contradict the Due Process Clause of the Fourteenth Amendment. That being said, another route for navigating around the three strikes provision is for prisoners to simply petition the courts to allow them to file again in spite of striking out.¹¹⁷ The bottom line is that prisoners who file frivolous lawsuits are a determined and persevering breed, and their

110. Segall, *supra* note 77. The article discusses how the “new law”—the PLRA—is supposed to help the judicial system deal with excessive numbers of frivolous claims. *Id.* However, it points out that even provisions like the three strikes rule have not stopped prisoners from bringing further suits once they have struck out. *Id.* It explains that prisoners have found ways to get around the provision and continue to file frivolous suits. *Id.*

111. 28 U.S.C. § 1915(g).

112. Segall, *supra* note 77. Recall that this article noted that inmate Higgason had filed a total of 114 cases in eight years.

113. Interview with J. Paul E. Plunkett, Federal District Court Judge for the Northern District of Illinois, in Chi., Ill. (Oct. 5, 2010). A topic discussed during the interview was the notion that we cannot completely close the doors of the courts to inmates. *Id.* Even in a case where a prisoner has filed a hundred frivolous suits, the very next one he files may in fact be a legitimate one, and to bar him from filing suit on that legitimate issue contradicts the essence of American justice. *Id.* Consequently, there always has to be a way to allow prisoners into the courts, even if it means maneuvering around legislation. *Id.*

114. Segall, *supra* note 77. Inmates have begun referring to the rule as the three strikes rule, meaning you have three strikes and you are out.

115. *See id.* (explaining that one inmate, Larriante Sumbry, struck out in the Indiana courts and subsequently decided to file in Arizona, Florida, and Washington, D.C., where the courts apparently would not have knowledge about the fact that she had struck out in Indiana).

116. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (proposing the idea that the Supreme Court does not wish to force silence upon prisoners when it comes to them attempting to litigate a wholly legitimate claim on their own behalf).

117. Plunkett, *supra* note 113. Judge Plunkett explained that a prisoner is always afforded the right to ask the court to hear her claim, despite the number of strikes, pursuant to the theory that at some point there is a possibility that she may have a legitimate claim that is deserving of judicial resolution. *Id.*

circumstances of incarceration afford them the opportunity to devote these characteristics to prison litigation at the expense of taxpayers.

The prison environment, where numerous convicts are confined in limited space, is a prime setting for legal experiences to be exchanged.¹¹⁸ Prisoners coach one another as to how to artfully design a suit that, although it will not necessarily proceed to trial, may force the State to settle with them.¹¹⁹ The process is greatly appealing because even frivolous suits can yield monetary gain for a prisoner. In the event that a prisoner files a frivolous suit completely without merit, he or she may still end up with a monetary settlement if it will be more costly for the State to continue to pursue the case than to settle.¹²⁰ This is the prisoners' strategy and they are not ashamed to concede that fact.¹²¹ For example, Prisoner Demos¹²² spoke poignantly about prisoners' seeming obsession and preoccupation with prison litigation. He has said, "[t]he law isn't just something I do while in [prison]. The law is something you live, sleep, and eat."¹²³ Now recall inmate Smith.¹²⁴ He is quite candid with respect to his attitude and plan regarding his time in prison. Smith's handwritten letter to the Attorney General summarizes the prisoner's wanton intent:

118. Groah, *supra* note 41. Groah explained the kind of dialogue that prisoners routinely engage in. *Id.* They share stories of suits they have filed, the progression of the suits, and any money they receive in settlements. *Id.* This behavior encourages fellow inmates to act similarly in the hope that they will receive money too, regardless of the merits of their claims. *Id.*

119. *Id.* Often the nature of the suit is one that will end in dismissal, yet it still requires funds from the state to get to that point. *Id.* In many cases, a settlement conference will ensue and the prisoner will be offered a sum of money to drop the suit. *Id.* Even if a suit would not have won on the merits in court, and the prisoner plaintiff would not have been able to recover monetary damages, the cost of continuing to fight the suit (various filings, depositions, etc.) will be more costly than settling for a nominal sum. *Id.* Consequently, the state ends up spending money just to get the suit to go away, and the prisoner still ends up with money for a claim that had a real value of zero. *Id.*

120. Plunkett, *supra* note 113.

121. Groah, *supra* note 41. Being that all of the prisoners are at least somewhat familiar with the judicial system, since their current situation resulted from exposure to it, they have at least a minimal understanding of how it works. *Id.* That, coupled with stories exchanged between inmates, makes them feel entitled to "play" the system. *Id.*

122. Demos is mentioned earlier in this Comment. Rhodes, *supra* note 91. After being convicted for burglary and attempted rape, Demos filed a series of suits ranging from alleging his civil rights were violated because paper money is no longer backed by silver to arguing his rights were abridged when the prison didn't recognize his new name, Anwarr Ibenn Abdul Hakeem Shabazz. *Id.*

123. *Id.*

124. Smith was convicted for arson. His story is discussed in detail *supra* Part I of this Comment.

HA HA! I'm costing the DOC and tax payers all kinds of money! You guys wanna keep me in prison? Fine! . . . I'm gonna make sure that I'm a costly prisoner . . . and by the time this 20 years adds up and is over with, I'm gonna cost all of you THOUSANDS and THOUSANDS of dollars! HA HA! There's nothing that you can do.¹²⁵

Perhaps the California Report should actually substitute its use of the word "hobby" for the more appropriate term: game. Therein lies one of the biggest issues. Filing frivolous prison litigation is just a game¹²⁶ to inmates who have nothing to lose and only financial aid to gain. The attitude of the litigious prisoner has altogether spoiled the original concept of prison litigation.

Consider why prisoners are even afforded the right to file claims in court with respect to their conditions of confinement.¹²⁷ Legitimate claims still exist.¹²⁸ Not only do the frivolous claims

125. The full text of Eric Smith's letter to the Attorney General is as follows:
Dear Ms. Isenberg:

HA!HA! I'm costing the DOC and tax payers all kinds of money! You guys wanna keep me in prison? Fine! I have no place to go! Why do you think I'm in credit class 3? In here, I get fed for free! HA HA! There's nothing you can do, and since you guys wanna keep me in here for a crime (arson) that I did not commit, I'm gonna make sure that I'm a costly prisoner—legal copies, legal postage, medication, the Indiana Attorney General's time and expenses—EVERYTHING! Even destroying state property in here, and making your guards mace me and shoot me with pepper balls! It all adds up, and by the time this 20 years adds up and is over with, I'm gonna cost all of you THOUSANDS AND THOUSANDS of dollars! Do 20 years for something I didn't do? For a first-time found conviction? Oh yeah! It's gonna cost all of you as much as I can. Do you really think I care about being free? Do you really think conduct reports scare me? HA HA! My life is over with!

Segall, *supra* note 1.

126. Groah, *supra* note 41. Mr. Groah routinely deposes inmates who have filed conditions of confinement claims. Many of the depositions are related to frivolous suits that are eventually settled. After one deposition, upon being asked by Mr. Groah why he filed such a seemingly frivolous suit, the inmate responded by explaining that it was all a "game" and he was just playing it. *Id.* He explained that the State's Attorney has his role and the prisoners have theirs. *Id.*

127. *Porter*, 534 U.S. at 532. The Court states that suits pertaining to "prison conditions" include "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Id.*

128. There are prisoner's suits that do warrant litigation. For example, while prison officials maintain general discretion over the running of prison facilities, their discretion is not so broad as to include maintaining a facility that is unfit for human habitation. PALMER, *supra* note 8, at 224. If the conditions of a prisoner's confinement are so abhorrent that they rise to the level of subhuman, then he is entitled to bring a suit to correct this injustice. *Id.* Additionally, prisoners are entitled to bring suit against prison officials for failure to provide timely and/or adequate medical care. *Id.* at 162. Another

stall already overwhelmed courts, but they also prevent legitimate claims from reaching the judicial resolution they deserve¹²⁹ while heavily burdening taxpayers. As the system currently operates, there are no real consequences for frivolous filings. Prisoners who once appropriately utilized constitutionally protected access to courts now play an unacceptable game with tax dollars.

IV. PROPOSAL

Money speaks. Money can be the catalyst to action or, conversely, an obstacle that spawns inaction. Money can be a motivator or a deterrent. It is arguably the single most powerful and influential entity in existence. Perhaps this is the reason behind the implementation of fines for or taxes on undesirable or unsavory behaviors. Consider President Obama's recent tax on cigarettes,¹³⁰ or fines for speeding.¹³¹ If you do not want someone to do something, chances are hitting him where it hurts—his pocket book—will likely prove to be an effective deterrent. At the very least, a financial burden will induce consideration before action. It is precisely this contemplation of human behavior, as it corresponds to personal economics, which is the foundation for the solution to excessive frivolous prison litigation. If a financial burden is placed on prisoners who bring frivolous suits by way of an amendment to the PLRA, their zeal for filing will likely be reduced to only those suits that boast legitimate claims. It is proposed that if a prisoner files a frivolous suit, he or she should be subject to a monetary penalty in the form of a deduction of a set

legitimate claim may be use of excessive force by prison officials against a prisoner. Groah, *supra* note 41.

129. See CITIZENS, *supra* note 12, at 3 (noting that if frivolous suits were eliminated from the judicial system, legitimate claims would have better access to justice).

130. *Single Largest Cigarette Tax Hike Goes Into Effect on Wednesday*, FOXNEWS.COM, Mar. 29, 2009, <http://www.foxnews.com/politics/2009/03/29/single-largest-cigarette-tax-hike-goes-effect-wednesday/>. The news article reports on the new tax that the Obama Administration proposed and signed into law. *Id.* The new tax would increase the rate from thirty cents per pack to one dollar and one cent per pack. *Id.* Monetary incentives are extremely powerful and this is demonstrated in the context of an addictive vice like cigarette smoking. The article quotes long time smokers who claimed that the tax would stop them from smoking. *Id.* It speaks to the power of monetary incentives that a seventy-one cent increase per pack would be enough to make long time, addicted smokers consider taking on the difficult task of ending their addictions. *Id.*

131. KY. REV. STAT. ANN. § 189.394 (West 2011). This speeding statute in Kentucky is titled: Fines for speeding; doubling of fines in highway work zones; highway work zone safety fund; doubling of fines in school areas with flashing lights. *Id.* Just like many other states, fines are imposed for speeding and may vary depending upon the number of miles over the speed limit the driver is traveling at as well as the type of street that the infraction occurs on. *Id.*

percentage of his prison account balance.

When a person becomes a prisoner, a personal account may be set up in his name to manage money he earns and spends while in prison.¹³² These accounts, referred to as commissary or canteen accounts,¹³³ are funded in three primary ways. First, when a prisoner is arrested, any money on his person at the time of the arrest will be credited to an account.¹³⁴ Second, friends or family members may also contribute funds to the prisoner's account.¹³⁵ Finally, money that is earned through jobs obtained during incarceration is deposited into the account.¹³⁶ Many prisoners seek employment while incarcerated and several states have programs dedicated to employing prisoners.¹³⁷

The money in accounts can be used to purchase a variety of items from the commissary including toothpaste or even candy bars,¹³⁸ but money is also deducted from the account if the prisoner has any legal dependants.¹³⁹ In fact, even if the prisoner

132. States have individual statutes that establish and regulate prisoner accounts. One such statute is § 441.135, titled: Canteen for prisoners; books of accounts; allowable expenditures; jail canteen account balance; calculation. KY. REV. STAT. ANN. § 441.135 (2007). The statute provides in pertinent part:

(1) The jailer may maintain a canteen for the benefit of prisoners lodged in the jail and may assign such jail employees and prisoners to operate the canteen as are necessary for efficient operation.

(2) All profits from the canteen shall be used for the benefit and to enhance the well-being of the prisoners. The jailer shall keep books of accounts of all receipts and disbursements from the canteen and shall annually report to the county treasurer on the canteen account.

(3) Allowable expenditures from a canteen account shall include but not be limited to recreational, vocational, and medical purposes.

Id.

133. Groah, *supra* note 41. Different sources label the accounts differently, but they are usually referred to as commissary or canteen accounts. *Id.*

134. See *Sickles v. Campbell Cnty.*, 501 F.3d 726, 729 (6th Cir. 2007) (discussing a person being arrested with \$128 on him at the time of arrest, and stating that this amount was later credited to his canteen account).

135. See *id.* at 728-29 (explaining further that friends or relatives may contribute to an inmate's account by way of money order or credit card).

136. See 57 OKLA. STAT. § 549 (2011) (detailing, *inter alia*, how inmates' wages shall be placed in their accounts and may be spent on a variety of things ranging from personal items to law suit filing fees).

137. County Jail Industry Programs, OHIO REV. CODE ANN. § 5147.30(d) (2004). This section establishes a program for employment of prisoners and states that is designed to seek and provide employment for as many prisoners as possible. *Id.*

138. Groah, *supra* note 41. Mr. Groah explained how many prisoners utilize funds in their commissary accounts. *Id.* He even provided a copy of an itemized list of the commissary deductions of one prisoner, which resembled a bank statement for a checking account. *Id.* Most of the deductions were small amounts, not usually more than a couple of dollars. *Id.*

139. 57 OKL. STAT. ANN. § 549(A)(5). This part of the statute specifically

does not have enough money in the account to cover such costs, funds may nevertheless be deducted from the account, in some cases leaving it with a negative balance.¹⁴⁰ It has been provided by some states that in this event, “[i]f funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner’s . . . canteen account.”¹⁴¹ Prisoners have an incentive to maintain a positive balance in their accounts so that they may purchase desired items while incarcerated, and also because they are paid the balance upon their release.¹⁴²

Due to the fact that prisoners’ accounts, similar to ordinary citizens’ bank accounts, have varying balances, it would be unproductive to impose a standard fine¹⁴³ on prisoners for filing frivolous suits. What would prove to be a major deterrent to one inmate may only be a minor inconvenience to another, thus undermining the proposal. For this reason, a set *percentage* of an inmate’s account should be deducted rather than a set *amount*. Because the balance of any given account is naturally subject to fluctuation (or may even become negative), the percentage should be determined based on the average of the prisoner’s account balance over the aggregate¹⁴⁴ time of imprisonment. This should also circumvent possible problems associated with a prisoner draining her account in anticipation of frivolous filing.

In order to effectuate this proposal, adequate notice must be supplied to prisoners. The question of how to notify prisoners of an amendment to the PLRA that potentially will have a great effect on their litigious behavior is not a difficult one to answer. There is

states that wages deposited into the account may be used for the inmate’s personal use or to cover costs he is obligated to pay for legal dependants. *Id.* This includes child support or spousal maintenance.

140. See KY. REV. STAT. § 441.265 (2000) (giving details as to how a prisoner may reimburse the jail for expenses incurred during his incarceration). Section 6 of the statute provides:

Payment of any required fees may be automatically deducted from the prisoner’s property or canteen account. If the prisoner has no funds in his account, a deduction may be made creating a negative balance. If funds become available or if the prisoner reenters the jail at a later date, the fees may be deducted from the prisoner’s property or canteen account.

Id.

141. 57 OKL. STAT. ANN. § 549. This seems particularly appropriate bearing in mind that many prisoners have rap sheets with multiple entries and often rotate through the revolving prison doors.

142. *Id.* § 549(A)(5).

143. A “standard fine” is meant to mean a single monetary amount, fifty dollars for example, written into the text of the amendment that would apply to all prisoners regardless of their account balances.

144. To ensure optimum benefit, “aggregate” should mean any and all time spent incarcerated—the sum of time spent in prison even if that means adding time spent for multiple sentences. This only seems logical given that many prisoners serve time for multiple offenses over their lifetimes.

one place that every prisoner has an incredibly high likelihood of visiting before he files suit—the law library. The Supreme Court has taken an affirmative stance concerning the duty of prison officials to provide adequate sources of legal knowledge; this ordinarily takes the form of a law library.¹⁴⁵ In order to draft pleadings and concoct their cases, most prisoners will consult the law library. Accordingly, signage posted at the entrance to (and perhaps throughout) the law library would serve to provide adequate notice to prisoners of the monetary penalty amendment to the PLRA and would also act as a constant reminder of the consequences of frivolous filing.

While imposing a financial burden may seem harsh or like it may come into conflict with the Equal Protection Clause, it is actually a common practice for judges to impose monetary sanctions on uncooperative or misbehaving parties to a lawsuit.¹⁴⁶ Furthermore, the Federal Rules of Civil Procedure make this completely within a judge's power, thus circumventing Equal Protection concerns.¹⁴⁷ However, it is at the judge's discretion to decide the extent of the sanction, and judges rarely impose monetary sanctions on prisoners.¹⁴⁸ With an amendment to the PLRA that provides guidance and instruction as to how to implement such a sanction, it is probable that judges would begin to fully utilize the power of Rule 11 with respect to prison litigation.

It is not uncommon for the "profits" of a monetary sanction to be used to cover the legal costs of the non-offending party.¹⁴⁹

145. *Bounds v. Smith*, 430 U.S. 817, 828 (1997). In this case the court held that prison authorities were responsible for providing legal materials to inmates. *Id.* Although the court did not specifically require a law library, it stated that a viable source of legal knowledge needed to be made available to inmates in order to ensure their constitutionally protected rights of access to the courts. *Id.* at 828–30.

146. *Plunkett*, *supra* note 113.

147. FED. R. CIV. P. 11. The Rule provides in pertinent part: "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." *Id.* The part of Section 11(b) that pertains to this Comment states, "the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument . . ." *Id.*

148. *Plunkett*, *supra* note 113. Often, judges will impose sanctions on a party that will require the misbehaving party to cover the costs of the other party. *Id.* Because these costs would be above and beyond what an ordinary prisoner would be capable of paying, judges usually do not place monetary sanctions on prisoners. *Id.*

149. *Id.* Judge Plunkett further explained that it is also at the discretion of the judge to decide where the funds from the sanctions will go or how they will be applied. *Id.* Judge Plunkett noted that based upon his experience, it is unlikely that a prisoner will be able to cover all costs of the opposing party, as the amount is typically quite high. *Id.*

However, it would be impractical for a judge to impose monetary sanctions on prisoners that would force them to pay the legal costs of the opposing parties, as that amount would likely be far beyond their economic resources.¹⁵⁰ Instead, the money from this sanction—the percentage from their prison accounts—should be transferred to the defending party. In the case of prison litigation brought under Section 1983, the defending party is the government.¹⁵¹ In effect, this way of apportioning the money will do a service to the government and alleviate some of the economic strain that frivolous prison litigation creates for the State.

The incentive for prisoners who file frivolous claims does not seem to be resolution¹⁵² of their problems, but rather financial gain. An amendment to the PLRA that would impose a monetary penalty for filing frivolous suits threatens a consequence that is in complete contradiction to their primary goals. This contradiction hints that an amendment sounding in economic burden on the prisoner, rather than the State, will prove a successful deterrent.

V. CONCLUSION

Frivolous prison litigation has been flooding the judicial system and simultaneously draining government resources since the 1960s without an adequate plug to slow the flow. The menace of excessive prison litigation was recognized by Congress as a legitimate problem in need of resolution, but the shoddy passage of the PLRA has quite obviously not done enough to curb the exponentially growing predicament. Despite the arguably well-intentioned barriers of the PLRA, frivolous claims continue to plague the system.

The current economic state of the country simply cannot withstand *any* undue financial hardship. The government simply cannot afford to pass up the opportunity to cut some of the costs that come with defending against frivolous suits, both by deterring prisoners from originally initiating them and putting money back into the government's hands when prisoners do insist on proceeding with unfounded claims.

150. *Id.* The judge also noted that in his experience most commissary accounts present balances of between twenty-five and a few hundred dollars. *Id.*

151. Recall that many of the actions brought under Section 1983 name prison officials or the sheriff (or both for that matter) as defendants. These types of defendants will be defended by a government entity such as the State's Attorney's Office.

152. Recall the story of Scott Anthony Gomez Jr. *Supra*, note 99. It seems highly unlikely that his true aim in filing his lawsuit against the prison was to increase prison facility security—which was the underlying theme to his suit. Far from wanting more secure ceiling tiles and heightened security, Gomez sought monetary compensation.

